

SOAH DOCKET NO. 582-07-2674
TCEQ DOCKET NO. 2007-0362-IHW

2008 MAY 15 PM 4:35

APPLICATION OF TEXCOM GULF
DISPOSAL, L.L.C. FOR TEXAS
COMMISSION ON ENVIRONMENTAL
QUALITY COMMISSION INDUSTRIAL
SOLID WASTE PERMIT NO. 87758

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BEFORE THE STATE OFFICE

CHIEF CLERKS OFFICE

OF

ADMINISTRATIVE HEARINGS

**LONE STAR GROUNDWATER CONSERVATION DISTRICT'S
EXCEPTIONS TO THE STATE OFFICE OF ADMINISTRATIVE HEARINGS'
PROPOSAL FOR DECISION AND FINDINGS OF FACT AND CONCLUSIONS OF LAW**

SUBMITTED ON MAY 15, 2008

**LLOYD GOSSELINK ROCHELLE
& TOWNSEND, P.C.
816 Congress Avenue, Suite 1900
Austin, Texas 78701
(512) 322-5800 (phone)
(512) 472-0532 (facsimile)**

**Michael A. Gershon
State Bar No. 24002134
Brian L. Sledge
State Bar No. 00719675
Jason Hill
State Bar No. 24046075**

**ATTORNEYS FOR LONE STAR
GROUNDWATER CONSERVATION DISTRICT**

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**LONE STAR GROUNDWATER CONSERVATION DISTRICT'S
EXCEPTIONS TO SOAH'S PROPOSAL FOR DECISION AND
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY:

The Lone Star Groundwater Conservation District, a protestant in this case (the
"District"), submits these exceptions to SOAH's Proposal for Decision and Proposed Findings of
Fact and Conclusions of Law ("PFD"), and would respectfully show the following:

I. INTRODUCTION

What standards apply to this application has been an open question and moving target
throughout this case. Only after the Executive Director (the "ED") submitted a list of rules
purported to be applicable days before the hearing was SOAH able to evaluate and make an
assessment of those rules.¹ SOAH's assessment, set forth in its PFD, provides:

Intervenors are correct that no specific set of solid-waste rules expressly addresses
a surface facility at an underground injection well site for nonhazardous industrial
wastewater.²

SOAH can point to only one rule that has any substantive guidance, 30 TAC § 335.4.³ There has
been no consensus on what rules or standards govern this case among the applicant, ED, and the

¹ TEX. GOV'T CODE § 2001.058(c) provides that "[a] state agency shall provide the administrative law
judge with a written statement of applicable rules or policies." The ED complied with this requirement on
December 7th, the Friday afternoon before the hearing.

² PFD at 8.

³ PFD at 7.

other parties at any point in this case, and the ED's own expert and legal staff are not working from the same set of criteria. For convenience of review, Attachment "A" is provided to summarize the various positions taken in this case as to what rules may apply, and to provide an outline of the rules believed to apply by the parties.

Irrespective of the lack of clarity as to what the regulatory standards are in this case, SOAH is of the position that it is appropriate to grant TexCom's application. SOAH's only solution and proposed remedy to address this defect in TCEQ's regulatory program is commencement of rulemaking to fill the regulatory void, which SOAH asserts is beyond its jurisdiction. Whether or not a petition for rulemaking is an appropriate remedy, it is improper to propose a grant of an application in the absence of substantive rules to guide the Commission, SOAH, and all parties through the hearings process. Accordingly, the District requests that the application be denied or remanded with the Commission's guidance as to what regulatory standards apply, as requested in the *Joint Motion to Certify Questions and Abate Proceeding and Alternative Motion for Summary Disposition*. Consistent with this approach, it is clear that Conclusions of Law Nos. 6, 7, and 19 are insupportable and should be struck. For the same reason that supports striking these Conclusions of Law, it logically follows that several other Findings of Fact and Conclusions of Law are inconclusive or indefinite absent guidance on the regulatory standards.

II. SOAH'S PFD IS INSUPPORTABLE ABSENT SUBSTANTIVE RULES AND CERTAINTY ABOUT WHAT REGULATORY STANDARDS APPLY IN THIS CASE

There is uncertainty as to how TCEQ meets its statutory mandate "to safeguard the health, welfare, and physical property of the people and to protect the environment" as the regulator of projects like TexCom's, when the rules do not address important aspects of a project

like TexCom's.⁴ Procedurally, the parties faced a major challenge to develop a case and present closing arguments in the absence of standards. As briefed in the *Joint Motion to Certify Questions and Abate Proceeding and Alternative Motion for Summary Disposition*, (1) the gap in the rules, (2) the evidentiary rulings that excluded related testimony, (3) the reliance on application instructions that did not undergo rulemaking under the Administrative Procedure Act (TCEQ Form INS-0024), and (4) the moving target as to what standards apply in the hearing on this application all add up to a deprivation of procedural due process to the District and the other parties protesting TexCom's application.

This problem with a regulatory gap came to light in the TSP case, another TCEQ case involving commercial, nonhazardous industrial solid wastes.⁵ In the TSP case, litigation, legislative action, and TCEQ rulemaking ensued to correct the problem, but only for commercial, nonhazardous industrial solid wastes proposed *for landfill disposal*.⁶ Unfortunately, commercial, nonhazardous industrial solid wastes proposed *for deep-well injection*, such as TexCom's, were not addressed in that legislative-regulatory fix. Consequently, there continues to be uncertainty as to how TCEQ evaluates an application like TexCom's.

Neither the ED nor TexCom has evaluated all of the applicable criteria submitted by the ED on December 7, 2007.⁷ How, then, can the ED's proposed draft permit be supportable if his own staff did not evaluate the application against all of these applicable rules? And how, then, can TexCom meet its burden of proof when it did not address all of the criteria outlined by the ED? Most of the information submitted in the application responds to the guidance in Form

⁴ TEX. HEALTH & SAFETY CODE § 361.002.

⁵ TNRCC Docket No. 2001-0657-MLM.

⁶ See 30 TEX. ADMIN. CODE Ch. 335, Subch. T ("Permitting Standards for Owners and Operators of Commercial Industrial Nonhazardous Waste Landfill Facilities").

⁷ See Attachment B.

INS-0024, which has no specific reference whatsoever in TCEQ's rules.⁸ *And the ED has not cited to Form INS-0024 in his list of applicable standards governing this case.* Nor has the ED's expert, Michael Graeber, taken the position, when asked, that Form INS-0024 serves as any benchmark for his review of the application. See Mr. Graeber's sworn prefiled testimony:

- Q. What state regulations did you review the permit application under?
A. **I reviewed the application under 30 Texas Administrative Code, Chapter 305.**
Q. Did you rely on any other law, publication, guidance, or materials while conducting your review of the permit application?
A. **No.**⁹

Consequently, how is the District, let alone SOAH or the Commission, supposed to evaluate the adequacy of the application? The District and all other parties are in the position of having to guess at what the standards are, and to attempt to cover all the bases, and hope that it guessed right.

As reviewed in extensive detail in the District's closing arguments and its *Joint Motion to Certify Questions and Abate Proceeding and Alternative Motion for Summary Disposition*, it is uncertain what information is required and what the standards are. What is clear is that the rules are bare-boned and inspecific,¹⁰ and that Form INS-0024 *outlines* a significant amount of the information that must be included in the ISW permit application. Without question the rules applicable in this case come nowhere close to the specificity of TCEQ's rules governing commercial industrial nonhazardous waste *landfill* facilities.¹¹ For convenient reference, the requirements in Form INS-0024 include:

⁸ Cf. TCEQ Form INS-0024 (the "Instructions"), ED's list of applicable standards filed December 7, 2007.

⁹ ED Exh. 14, p. 4.

¹⁰ See 30 TEX. ADMIN. CODE §§ 305.45(a)(8)(A) and (C) and 305.50(a)(1), (2), (3) and (7), which serve as the basis for the information required in the Instructions.

¹¹ Cf. 30 TEX. ADMIN. CODE Ch. 335, Subch. T; ED's December 7th List of Applicable Rules.

- (1) waste treatment, processing and storage facility and operational Security measures (Section II.A. of Form INS-0024);
- (2) inspection and maintenance requirements (Section II.B. of Form INS-0024);
- (3) recordkeeping (Section II.E. of Form INS-0024);
- (4) description of roads (Section II.F. of Form INS-0024);
- (5) standards for the waste acceptance plan (Section III. of Form INS-0024);
- (6) geology report (Section V. of Form INS-0024);
- (7) surface water protection plan (Section IV of Form INS-0024); and
- (8) engineering report, (Section IV of Form INS-0024).¹²

These requirements are not addressed with any specificity in the rules. The only basis for these requirements in the rules is the ED's *discretion* through his general ability to seek information under sections 305.45(a)(8)(A) and (C) and 305.50(a)(1), (2), (3) and (7). As briefed in detail in the *Joint Motion to Certify Questions and Abate Proceeding and Alternative Motion for Summary Disposition* and at pp. 47-62 of the District's closing arguments (Section III (introduction) and III.A), these instructions are clearly a statement of general applicability interpreting and prescribing law and policy and describing the procedure and practice requirements for TCEQ's processing of TexCom's ISW permit application. As such, this guidance must be adopted through rulemaking.¹³

¹² District Exh. 7.

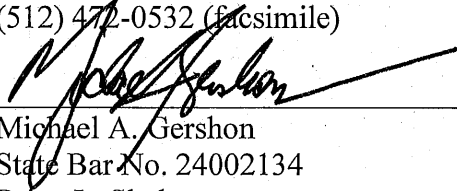
¹³ TEX. WATER CODE § 5.013 (TCEQ responsible for administration of Chapter 361 of TEX. HEALTH & SAFETY CODE Ch. 361); TEX. WATER CODE § 5.103 (a) and (c) ("The commission *shall adopt any rules necessary to carry out its powers and duties under this code* and other laws of this state...*Rules shall be adopted in the manner provided by Chapter 2001, Government Code.* As provided by that Act, the commission must adopt rules when adopting, repealing, or amending any agency statement of general applicability that interprets or prescribes law or policy or describes the procedure or practice requirements of an agency. The commission shall follow its own rules as adopted until it changes them in accordance with that Act."); *see also* § 361.024(e) ("Rules shall be adopted as provided by Chapter 2001, Government Code. As provided by that Act, the commission must adopt rules when adopting, repealing, or amending any agency statement of general applicability that interprets or prescribes law or policy or describes the procedure or practice requirements of the agency. The commission shall follow its own rules as adopted until it changes them in accordance with that Act.").

III. CONCLUSION

For the reasons set forth above and in the more detailed briefing in the *Joint Motion to Certify Questions and Abate Proceeding and Alternative Motion for Summary Disposition* and at pp. 47-62 of the District's closing arguments (Section III (introduction) and III.A), the District respectfully requests that the Commission deny TexCom's applications. Alternatively, if the Commission is of the opinion that TCEQ's ISW rules are insufficient to provide adequate standards and due process, as the District contends, the District would seek the Commission's remand with guidance as to what on the applicable regulatory standards, with an opportunity for a hearing to address any issues not adequately addressed in the void of regulatory guidance.

Respectfully submitted,

LLOYD GOSSELINK ROCHELLE
& TOWNSEND, P.C.
816 Congress Avenue, Suite 1900
Austin, Texas 78701
(512) 322-5800 (phone)
(512) 472-0532 (facsimile)



Michael A. Gershon
State Bar No. 24002134
Brian L. Sledge
State Bar No. 00719675
Jason Hill
State Bar No. 24046075

ATTORNEYS FOR LONE STAR
GROUNDWATER CONSERVATION DISTRICT

CERTIFICATE OF SERVICE

SOAH Docket No. 582-07-2674;
TCEQ Docket No. 2007-0362-IHW

I hereby certify that on this the 15th day of May, 2008, a true and correct copy of the foregoing document was provided by hand delivery, first class mail, facsimile, or e-mail to the persons listed below:

Honorable Catherine C. Egan
Honorable Thomas H. Walston
Administrative Law Judges
State Office of Administrative Hearings
300 West 15th Street, Suite 502
Austin, Texas 78701

Mr. John E. Williams
Ms. J. Diane Goss
Environmental Law Division (MC-173)
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087
johwilli@tceq.state.tx.us
dgoss@tceq.state.tx.us
(512) 239-0606 (fax)

Representing the Executive Director

Ms. LaDonna Castañuela
Office of Chief Clerk (MC-105)
Attention: Docket Clerk
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087
(512) 239-3311 (fax)

Office of the Chief Clerk

Ms. Emily Collins
Office of Public Interest Counsel (MC-103)
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087
ecollins@tceq.state.tx.us
(512) 239-6377 (fax)

Representing the Office of Public Interest
Counsel

Mr. John A. Riley
Mr. Patrick W. Lee
Ms. M. Nicole Adame Winningham
Vinson & Elkins
2801 Via Fortuna, Suite 100
Austin, Texas 78746-7568
jriley@velaw.com; plee@velaw.com;
nadame@velaw.com
(512) 236-3329 (fax)

Representing Applicant TexCom Gulf
Disposal, L.L.C.

Mr. David K. Walker
Ms. Julie B. Stewart
207 W. Phillips
Conroe, Texas 77301
dwalker@co.montgomery.tx.us
(936) 760-6920 (fax)
301 N. Thompson, Suite 107
Conroe, Texas 77301
jstewart@co.montgomery.tx.us
(936) 539-7997 (fax)

Representing Montgomery County
and City of Conroe

Mr. Kevin A. Forsberg
15949 Hwy. 105 W. Suite 59
Montgomery, Texas 77316
Kevin@forsberglaw.net;
Forsberglaw@earthlink.net
(936) 583-6229 (fax)

Representing Flora Harrell, James Langston,
James A. Langston III, Lois Nelson, Edgar and
Shirley Hoagland, Patty Mouton, Edwin A.
(Art) Wilson, Al and Jerry Zaruba, Nicky E.
Dyer, Brian Rodel, and Richard Ward

Mr. Richard Ward
16015 Creighton
Conroe, Texas 77304
Mike.Ward@nov.com
(936) 756-8102

Designated Representative of former Pro Se
Parties (courtesy copy)



MICHAEL A. GERSHON

CHIEF CLERKS OFFICE

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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

ATTACHMENT “A”

**REVIEW OF STANDARDS APPLIED BY EXECUTIVE DIRECTOR AND
APPLICANT TEXCOM GULF DISPOSAL, L.L.C.**

**I. Standards Set Forth by TCEQ Staff in Prefiled Testimony
Submitted on November 13, 2007**

The only TCEQ staff member to review the application applied only 30 Tex. Admin. Code Ch. 305 ("Consolidated Permits"), and did not apply any other law, publication, guidance, or materials. See prefiled testimony of Michael D. Graeber, P.E.:

- Q. What is the purpose and scope of your testimony in this proceeding?
A. **The purpose of my testimony is to explain my role in drafting the Technical Summary and Executive Director's Preliminary Decision and Final Draft Permit, and my role in the Executive Director's review of Texcom Gulf Disposal, LLC's application for Proposed Industrial Solid Waste Permit No. 87758.**

* * *

- Q. Have you reviewed the application in whole or in part?
A. **I reviewed the entire application.**
Q. Did anyone else review this application?
A. **No.**
Q. What state regulations did you review the permit application under?
A. **I reviewed the application under 30 Texas Administrative Code, Chapter 305.**
Q. Did you rely on any other law, publication, guidance, or materials while conducting your review of the permit application?
A. **No.¹**

**II. Standards Set Forth in Executive Director's Response to Public Comments
Submitted to TCEQ Chief Clerk on February 6, 2007**

The Executive Director states that only 30 Tex. Admin. Code Ch. 305 applies.

**III. Standards Set Forth in Technical Summary and
ED's Preliminary Decision dated June 5, 2006**

"The proposed permit is required by 30 TAC 335.2. A draft permit has been prepared in accordance with applicable requirements of 30 TAC Chapters 335 and 305, which have been adopted under the authority of the TEXAS HEALTH AND SAFETY CODE ANN., Chapter 361 (Vernon Supp.), and Section 5.103, TEXAS WATER CODE ANN. (Vernon Supp.)."

¹ Michael Graeber's prefiled testimony, at p. 4.

**IV. Standards Applied by TexCom's Designated Expert in Prefiled Testimony
Submitted on November 13, 2007**

TexCom's only expert witness responsible for the application testified about only the following standards: (1) TCEQ's instructions for completing the application and (2) 30 Tex. Admin. Code § 281.5, (3) 30 Tex. Admin. Code § 305.45, and (3) 30 Tex. Admin. Code § 305.50.²

V. Standards Alleged to be Applicable by TexCom on November 27, 2007

In oral arguments on Motions to Certify Questions and for Summary Disposition, TexCom cites 30 Tex. Admin. Code §§ 281.5, 305.45, 305.50, 331.63(f), 331.66, and 335.4(3) as the regulations applicable to the application.³

VI. TCEQ Executive Director's Submission of Standards on December 7, 2007

See attachment

² Carl Brassow's prefiled testimony, at p. 7.

³ See transcript of hearing held November 27, 2007.

ATTACHMENT “B”

Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*
Glenn Shankle, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

December 7, 2007

Honorable Thomas H. Walston and Catherine C. Egan
Administrative Law Judges
State Office of Administrative Hearings
William P. Clements Building
300 W. 15th Street, Room 504
P.O. Box 13025
Austin, Texas 78711-3025

Re: Applications of TexCom Gulf Disposal, L.L.C.,
SOAH Docket No. 582-07-2673; TCEQ Docket No. 2007-0204-WDW
UIC Permit Nos. WDW410, WDW411, WDW412, and WDW413.
Industrial Solid Waste Permit No. 87758
SOAH Docket No. 582-07-2674; TCEQ Docket No. 2007-0362-IHW

Dear Judges Walston and Egan:

I am writing on behalf of the Executive Director of the Texas Commission on Environmental Quality to provide the judges and the parties a list of the regulations that the Executive Director believes are applicable to Executive Director's review of an application for a nonhazardous industrial solid waste permit.

Sincerely,

A handwritten signature in cursive script that reads "Diane Goss".

J. Diane Goss, Staff Attorney
Environmental Law Division
Representing the Executive Director of the
Texas Commission on Environmental Quality

cc: attached service list
Enclosure

**Applicable Rules Considered in the Executive Director's Review of an Application
for a Nonhazardous Industrial Solid Waste Permit**

The Executive Director considers the sections of 30 Texas Administrative Code listed below applicable to the review of a permit application for a proposed nonhazardous industrial solid waste permit.

For Financial Assurance Requirements:

Chapter 37, Subchapter P: Financial Assurance for Hazardous and Nonhazardous Industrial Solid Waste Facilities

Applicable portions of § 37.6001 (with reference to § 335.7)

Applicable definitions in 37.6011 referencing § 37.11 and § 335.1

Applicable portions of § 37.6021

To Assure Compliance with General and Specific Permit Requirements/Standards:

Chapter 305, Subchapter A: General Provisions

Applicable portions of § 305.1 (scope and applicability), § 305.2 (definitions), and § 305.3 (abbreviations)

Chapter 305, Subchapter C: Application for Permit

Applicable portions of § 305.41 (applicability), § 305.42 (application required), § 305.43 (who applies), § 305.44 (signatories to application), and § 305.47 (retention of application data)

Chapter 335, Subchapter A: Industrial Solid Waste and Municipal Hazardous Waste

Applicable portions of § 335.1 (definitions), § 335.2 (permit required), § 335.4 (general prohibitions), and § 335.30 (Appendix I)

Chapter 335, Subchapter F: Permitting Standards

Applicable portions of §§ 335.153 through 335.155 for reporting of emergency situations

Evaluation of Necessary General Information Related to the Applicant, the Proposed Activity, and the Proposed Site:

Chapter 305, Subchapter C: Application for Permit

§ 305.45: Contents of Application for Permit including §§ 305.45(a)(1) through 305.45(a)(7)

To Assure Compliance with the Minimum Engineering Requirements, Waste Management and Operational Standards of the Proposed facility and the facility Units:

Chapter 305, Subchapter C: Application for Permit

§ 305.45(a)(8): supplemental technical report

§ 305.45(a)(8)(A): general description of facilities and systems used for or in connection with the collection, transportation, and disposal of waste

§ 305.45(a)(8)(C): such other information as reasonably may be required by the executive director for an adequate understanding of the project or operation

§ 305.50: Additional Requirements for an Application for a Hazardous or Industrial Solid Waste Permit.

§ 305.50(a)(1): submit an original and three copies of application & exhibits

§ 305.50(a)(2): submit plans and specifications for construction & operation of facility, staffing pattern, qualifications of key personnel, & closure plan.

§ 305.50(a)(3): Any other information as deemed necessary to determine if facility and operation will comply with applicable rules and/or statutes

§ 305.50(a)(7): Engineering documents prepared and signed by a Licensed Professional Engineer

Chapter 335 Subchapter A, § 335.3 (technical guidelines)

For Processing of Changes to Permits after the Permit has been Issued:

Chapter 305, Subchapter D: Amendments, Renewals, Transfers, Corrections, Revocation, and Suspension of Permits

Applicable portions of §§ 305.61 through 305.69

Standard Provisions Made Part of the Permit to Assure Compliance with the Permit or any Applicable Laws and Regulations:

Chapter 305, Subchapter F: Permit Characteristics and Conditions

Applicable portions of §§ 305.121 through 305.125

Applicable portions of §§ 305.127 through 305.129

Chapter 305, Subchapter G: Additional Conditions for Hazardous and Industrial Solid Waste Permits

Applicable portions of § 305.141 (applicability), § 305.142 (duty to comply), § 305.143 (recordkeeping), § 305.144 (certification and inspection), and § 305.145 (release or discharges of solid waste).

To Assure Compliance with Standards for Closure of the Facility:

Chapter 335, Subchapter A

§ 335.8 for closure and remediation requirements

Chapter 350: Texas Risk Reduction Program (TRRP) for closure requirements

TexCom Gulf Disposal, L.L.C.
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 SOAH Docket No. 582-07-2674
 TCEQ Docket No. 2007-0362-IHW

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SERVICE LIST

TexCom Gulf Disposal, L.L.C., Applicant	<p> John A. Riley Vinson & Elkins The Terrace 7, 2801 Via Fortuna, Suite 100 Austin, Texas 78746-7568 (512) 542-8520 (512) 236-3329 (facsimile) jriley@velaw.com </p> <p> Patrick Lee Vinson & Elkins The Terrace 7, 2801 Via Fortuna, Suite 100 Austin, Texas 78746-7568 (512) 542-8629 (512) 236-3265 (facsimile) plee@velaw.com </p> <p> Nikki Adame Winningham nadame@velaw.com </p>
State Office of Administrative Hearings	<p> The Honorable Catherine C. Egan State Office of Administrative Hearings William P. Clements Building 300 West 15th Street, Room 504 P.O. Box 13025 Austin, Texas 78711-3025 (512) 475-4993 (512)-475-4994 (facsimile) </p> <p> The Honorable Thomas H. Walston Administrative Law Judge State Office of Administrative Hearings 300 West 15th Street, Suite 504 P.O. Box 13025 Austin, Texas 78711-3025 (512) 475-4993 (512)-475-4994 (facsimile) </p>
Office of Public Interest Counsel	<p> Emily Collins, Office of Public Interest </p>

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	Counsel Texas Commission on Environmental Quality TCEQ MC-103 P.O. Box 13087 Austin, Texas 78711-3087 (512) 239-6823 (512) 239-6377 (facsimile) ecollins@tceq.state.tx.us
Executive Director, Texas Commission on Environmental Quality	J. Diane Goss Staff Attorney Texas Commission on Environmental Quality Environmental Law Division, MC 173 P.O. Box 13087 Austin, Texas 78711 (512) 239-5731 (512)-239-0606 (facsimile) dgoss@tceq.state.tx.us John E. Williams Staff Attorney Texas Commission on Environmental Quality Environmental Law Division, MC 173 P.O. Box 13087 Austin, Texas 78711 (512) 239-0455 (512)-239-0606 (Facsimile) johwilli@tceq.state.tx.us Don Redmond Staff Attorney Texas Commission on Environmental Quality Environmental Law Division, MC 173 P.O. Box 13087 Austin, Texas 78711 (512) 239-0612 (512)-239-0606 (Facsimile) dredmond@tceq.state.tx.us
Lone Star Groundwater Conservation District, Protestant	Michael A. Gershon Brian L. Sledge

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	Jason Hill Lloyd Gosselink Blevins Rochelle & Townsend, P.C. 816 Congress Avenue, Suite 1900 Austin, Texas 78701 (512) 322-5800 (512) 472-0532 (facsimile) mgershon@lglawfirm.com bsledge@lglawfirm.com jhill@lglawfirm.com
Aligned Protestants Montgomery County and City of Conroe	David Walker County Attorney 207 W. Phillips Conroe, Texas 77301 (936) 539-7828 (936) 539-7997 (facsimile) dwalker@co.montgomery.tx.us Julie Stewart Asst. County Attorney 207 W. Phillips Conroe, Texas 77301 (936) 539-7828 (936) 539-7997 (facsimile) jstewart@co.montgomery.tx.us
Aligned Individual Protestants Nicky E. Dyer, Flora Harrell, Protestant Edgar and Shirley Hoagland James A. Langston III James Langston Lois Nelson Brian Rodel Richard Ward Edwin A. (Art) Wilson	Kevin A. Forsberg 15949 HWY. 105 W. Suite 59 Montgomery, Texas 77316 (936) 588-6226 (936) 588-6229 (facsimile) kevin@forsberglaw.net